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11 BANK, NA, AS TRUSTEE FOR CERTIFICATEHOLDERS OF BEAR  
12 STEARNS ASSET BACKED SECURITIES TRUST 2005-3, ASSET-BACKED  
13 CERTIFICATES, SERIES 2005-3

14 UNITED STATES BANKRUPTCY COURT  
15  
16 NORTHERN DISTRICT OF CALIFORNIA - OAKLAND DIVISION

17 In re

18 NICOLE CHRISTINA MCCONVILLE,

19 Debtor(s).

Case No.09-71561

Chapter 7

R.S. No. CJR-603

MOTION FOR RELIEF FROM  
AUTOMATIC STAY  
(11 U.S.C. § 362 and Bankruptcy Rule 4001)

DATE: March 05, 2010  
TIME: 11:00AM  
CTRM: 201

1300 Clay Street, Suite 300  
Oakland, CA 94604-1426

20 Bank of America, NA, as successor by merger to LaSalle Bank, NA, as Trustee for  
21 certificateholders of Bear Stearns Asset Backed Securities Trust 2005-3, Asset-Backed  
22 Certificates, Series 2005-3 ("Movant"), moves this court for an order terminating the automatic  
23 stay of 11 U.S.C. § 362 as to Movant, so that Movant may commence and continue all acts  
24 necessary to enforce its security interest in real property generally described as 2527 & 2529  
25 Martin Luther King Jr. Way, Oakland, California 94612.

1 On or about December 2, 2009, Nicole Christina McConville ("Debtor") filed a  
2 voluntary petition under Chapter 7 of the Bankruptcy Code, and Tevis Thompson was appointed  
3 as Chapter 7 Trustee. As a result of said filing, certain acts and proceedings against Debtor and  
4 the bankruptcy estate are stayed as provided in 11 U.S.C. § 362.

5 Movant moves this court for relief from stay under 11 U.S.C. §§ 362(d)(1) and  
6 362(d)(2).

7 **MEMORANDUM OF POINTS AND AUTHORITIES**

8 **I.**

9 **MOVANT IS ENTITLED TO RELIEF FROM THE**  
10 **AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(2).**

11 **NO EQUITY**

12 11 U.S.C. § 362(d)(2) provides that relief from the automatic stay shall be granted if the  
13 debtor does not have any equity in the property and the property is not necessary to the debtor's  
14 effective reorganization.

15 In In re San Clemente Estates, 5 B.R. 605 (Bankr. S.D. Cal. 1980), the court stated that:  
16 § 362(d)(2) reflects congressional intent to allow creditors to  
17 immediately proceed against the property where the debtor has no  
18 equity and it is unnecessary to the reorganization, even where the  
debtor can provide adequate protection under § 362(d)(1).  
(Emphasis added).

19 Id. at 610 (emphasis added).

20 In In re Mikole Developers, Inc., 14 B.R. 524, 525 (Bankr. E.D. Pa. 1981), the court  
21 stated that in determining whether equity exists in the property for purposes of § 362(d)(2), all  
22 encumbrances are totalled, whether or not all the lienholders have joined in the request for relief  
23 from stay. The Ninth Circuit has concurred with this view in Stewart v. Gurley, 745 F.2d 1194  
24 (9th Cir. 1984).

25 An appropriate cost of sale factor should also be added to determine if the debtor has  
26 any equity in the property. La Jolla Mortgage Fund v. Rancho El Cajon Associates, 18 B.R.  
27 283, 289 (Bankr. S.D. Cal. 1982).

28 //.

1 On or about April 1, 2005, Debtor, for valuable consideration, made, executed and  
2 delivered to Silver State Financial Services, dba Silver State Mortgage ("Lender") a Note in the  
3 principal sum of \$456,000.00 (the "Note"). Pursuant to the Note, Debtor is obligated to make  
4 monthly principal and interest payments commencing June 1, 2005, and continuing until May 1,  
5 2035, when all outstanding amounts are due and payable. The Note provides that, in the event  
6 of default, the holder of the Note has the option of declaring all unpaid sums immediately due  
7 and payable. A true and correct copy of the Note is attached to the Declaration in Support of  
8 Motion for Relief From Automatic Stay as exhibit A and incorporated herein by reference.

9 On or about April 1, 2005, the Debtor made, executed and delivered to Lender a Deed of  
10 Trust (the "Deed of Trust") granting Lender a security interest in real property commonly  
11 described as 2527 & 2529 Martin Luther King Jr. Way, Oakland, California 94612 (the "Real  
12 Property"), which is more fully described in the Deed of Trust. The Deed of Trust provides that  
13 attorneys' fees and costs incurred as a result of the Debtor's bankruptcy case may be included in  
14 the outstanding balance under the Note. The Deed of Trust was recorded on April 7, 2005, in  
15 the Official Records of Alameda County, State of California. A true and correct copy of the  
16 Deed of Trust is attached to the Declaration in Support of Motion for Relief From Automatic  
17 Stay as exhibit B and incorporated herein by reference.

18 Subsequently, all beneficial interest in the Note and the Deed of Trust was sold,  
19 assigned and transferred to Movant. A true and correct copy of the Corporation Assignment of  
20 Deed of Trust evidencing the Assignment of the Deed of Trust to Movant is attached to the  
21 Declaration in Support of Motion for Relief From Automatic Stay as exhibit C and incorporated  
22 herein by reference.

23 The obligation under the Note is in default as of September 1, 2008, for failure to make  
24 payments to Movant. As of January 26, 2010, the total obligation due and owing under the  
25 Note is in the approximate amount of \$502,452.51, representing the principal balance of  
26 \$441,738.78, interest in the sum of \$45,055.73, late charges in the amount of \$1,879.02, escrow  
27 advances in the amount of \$12,248.20, and a recoverable balance in the amount of \$1,530.78.  
28 This is an approximate amount for purposes of this Motion only, and should not be relied upon

as such to pay off the subject loan as interest and additional advances may come due subsequent to the filing of the Motion. An exact payoff amount can be obtained by contacting Movant's counsel. Further, Movant has incurred additional post-petition attorneys' fees and costs in bringing the instant Motion. Moreover, the total arrears under the Note are in the approximate sum of \$70,077.30, excluding the post-petition attorneys' fees and costs incurred in filing the instant Motion. A true and correct copy of the contractual payment accounting pursuant to Local Rule 4001-1(g)(1) is attached to the Declaration in Support of Motion for Relief From Automatic Stay as exhibit D and incorporated herein by reference.

## II.

### RELIEF FROM STAY

### LACK OF EQUITY

Movant is informed and believes that, based on the Debtor's bankruptcy Schedules and Statements, the fair market value of the Property is approximately \$369,000.00. True and correct copies of the Debtor's bankruptcy Schedules "A" and "D" are collectively attached to the Declaration in Support of Motion for Relief From Automatic Stay as exhibit E and incorporated herein by reference.

Based on the above, Movant maintains that the equity in the Property is as follows:

Fair Market Value:	\$369,000.00
Less:	
Movant's Trust Deed	\$502,452.51
EMC Mortgage – 2 <sup>nd</sup> Deed of Trust	\$120,294.00
Costs of Sale (8%)	\$29,520.00
Equity in the Property:	\$<283,266.51>

As a result, there is no equity in the Property for the bankruptcy estate. Moreover, since this is a Chapter 7 proceeding, there is no reorganization in prospect. As a result, Movant is entitled to relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(2).

Debtor's Statement of Intent indicates it is the intent of the Debtor to surrender the Real Property in full satisfaction of Movant's secured claim. A true and correct copy of the Debtor's Statement of Intent is attached to the Exhibits as exhibit F and incorporated herein by reference.

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### CAUSE - LACK OF ADEQUATE PROTECTION

Movant submits that adequate protection in this case requires normal and periodic cash payments, as called for by the Note, plus the repayment of any and all delinquent amounts owed to Movant, including all attorneys' fees and costs incurred in the filing of this motion.

By reason of the foregoing, Movant is entitled to relief from stay under 11 U.S.C. § 362(d)(1), based upon the failure of Debtor to provide adequate protection to Movant.

1. Terminating the automatic stay of 11 U.S.C. § 362, as it applies to the enforcement by Movant of all of its rights in the Real Property under the Note and the Deed of Trust;

3. Granting Movant leave to foreclose on the Real Property and to enforce the security interest under the Note and the Deed of Trust, including any action necessary to obtain possession of the Property;

5. Alternatively, in the event this court declines to grant Movant the relief requested above, Movant requests that an Order for adequate protection be issued, requiring the Debtor to reinstate and maintain in a current condition all obligations due under the Note and Deed of

1 Trust and all other deeds of trust encumbering the Real Property, including Debtor's obligations  
2 to pay when due (a) the monthly installments of principal and interest, as required under the  
3 Note; (b) tax/insurance obligations; and (c) any sums advanced by Movant on behalf of Debtor  
4 in order to protect Movant's interest in the Real Property, including all attorneys' fees and costs  
5 incurred in the filing of this motion;

6 6. That the attorneys' fees and costs incurred by Movant for filing the instant Motion  
7 be included in the outstanding balance of the Note as allowed under applicable non-bankruptcy  
8 law; and

9 7. For such other and further relief as the court deems just and proper.

10  
11 Dated: February 17, 2010

PITE DUNCAN, LLP

12  
13 /s/ CASPER J. RANKIN (CA SBN 249196)  
14 Attorneys for BANK OF AMERICA, NA, AS  
15 SUCCESSOR BY MERGER TO LASALLE  
16 BANK, NA, AS TRUSTEE FOR  
17 CERTIFICATEHOLDERS OF BEAR STEARNS  
18 ASSET BACKED SECURITIES TRUST 2005-3,  
19 ASSET-BACKED CERTIFICATES, SERIES  
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